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No. 83-

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FILED
MAR 29 1984
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In the Supreme Court of the United States

October Term, 1983

DONALD OTIS BURNWORTH,

Petitioner,

vs.

EULA DEL BURNWORTH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

HUFFMAN REED WALKER

(Counsel of Record)

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QUESTION PRESENTED*

1. Whether a referee's decision to allow one party in state court divorce proceeding five and one-half days to present evidence while allowing other party one-half day to present evidence after imposing time limitations on his direct and cross-examination and other testimony, in a case involving over \$100,000.00 in assets subject to division by the court is a violation of party's right to due process of law granted by the United States Constitution, Fourteenth Amendment, Section 1?

*All parties to the proceedings in the state courts are listed in the caption.

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No. 83-
In the Supreme Court of the United States

October Term, 1983

DONALD OTIS BURNWORTH,
Petitioner,

vs.

EULA DEL BURNWORTH,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE
OF COLORADO**

Petitioner prays that a writ of certiorari issue to review the order of the Colorado Supreme Court dated January 9, 1984.

OPINIONS BELOW

The order of the Supreme Court of Colorado denying certiorari is unpublished and is printed in Appendix A at p. A1. The order of the Court of Appeals of the State of Colorado denying petitioner's Petition for Rehearing is unpublished is printed in Appendix B at p. A3. The opinion of the Colorado Court of Appeals affirming the district court's order and findings is unpublished and is printed in Appendix C at p. A4. The district court's order

overruling petitioner's Motion for New Trial is printed in Appendix D at p. A6. The order of the District Court of Adams County, Colorado, reviewing the district court and referee's orders under Local Rule 38 of the Adams County District Court is printed in Appendix E at p. A7. The referee's findings, recommendations and order, approved by the district court are printed in Appendix F at p. A10.

JURISDICTION

The order of the Colorado Supreme Court denying certiorari to the petitioner is dated January 9, 1984. The jurisdiction of this Court rests on 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment Fourteen

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE¹

A. Procedure

Donald O. Burnworth and Eula D. Burnworth were married on December 21, 1976. Mrs. Burnworth filed her Petition for Dissolution of Marriage in the District Court of Adams County Colorado on the 9th day of July, 1979.

After appropriate pleadings and discovery, the matter was set for hearing before a referee pursuant to Rule 38 of the Local Rules of the 17th Judicial District of Colorado. Six bifurcated hearings were held before the same referee, for a period, in total, approximating four full days, to wit: April 30, 1980; June 18, 1980; July 16, 1980; October 2, 1980; October 21, 1980; and October 22, 1980. On November 6, 1980, the referee submitted his findings, recommendations and order dividing property and otherwise disposing of the rights of the parties which was approved and made an order of the Adams County District Court on that same day.

Mr. Burnworth timely filed a motion under Adams County District Court Local Rule 38 for review of the transcript of the record and a trial de novo before a district judge. The chief judge of the Adams County District Court, on April 10, 1981, affirmed the referee's findings, recommendations and order and perforce the district court order of November 6, 1980, affirming and adopting the referee's findings, recommendation and order. Thereafter, Mr. Burnworth timely filed a motion for new trial with the district court, which was overruled. Thereafter, Mr.

1. References to the record refer to the transcript of proceedings, volume number in which transcript or document appeared below, date of proceedings below, and page number upon which matter appears, thus Tr. Vol. VI, 10/22/80, pp.

Burnworth timely filed his notice of appeal to the Colorado Court of Appeals. On April 21, 1983, the Colorado Court of Appeals affirmed the referee's and trial court's decision and decision of the chief judge of the Adams County District Court which affirmed the referee's and the district court judge's decisions. Mr. Burnworth timely filed a petition for rehearing by the Colorado Court of Appeals, which on June 9, 1983, was denied. Mr. Burnworth's petition for certiorari to the Colorado Supreme Court was then filed and was denied January 9, 1984. From these proceedings Mr. Burnworth seeks this Court's certiorari review.

B. Facts

Mr. and Mrs. Burnworth's dissolution proceedings were, under Local Rule 38 of the 17th Judicial District for the State of Colorado (Adams County) heard by a referee, which hearing is authorized under certain circumstances by Colorado Rule of Civil Procedure 53. After hearings had been held for parts of six days prior, spanning parts of seven months, the referee during the morning of October 22, 1980, ruled (Tr. Vol. VI, 10/22/80, p. 7):

... I am going to finish at five o'clock tonight. I don't want to have to continue this matter for further hearing because it's coming to the point where it's very, very difficult that I already know this much. Even after I hear all the evidence I'm going to have to take it under advisement because of the fact that I'm going to have to put all of this stuff together some way or the other in order to know what I'm doing.

At this point, Mr. Burnworth's wife was still presenting evidence in her case in chief, as she had the previous five times the case had been heard. Except for two minor

witnesses called out of order the first day of hearings, the petitioner, Mr. Burnworth, had yet to present his case in chief.

After the referee made his first decision to conclude the hearings October 22, 1980, a decision about which neither of the parties had any prior notice, he then limited Mr. Burnworth's cross-examination of his wife to one hour (Tr. Vol. VI, 10/22/80, pp. 38, 41) and limited the time available to question all other witnesses to twenty minutes apiece (Tr. Vol. VI, 10/22/80, p. 41). As Mr. Burnworth's counsel was cross-examining Mrs. Burnworth, the Court ordered the examination to stop (Tr. Vol. VI, 10/22/80, pp. 73, 74, 76, 77). Mr. Burnworth's request for additional time to complete cross-examination was denied although an offer of proof was made (Tr. Vol. VI, 10/22/80, pp. 74, 77).

Mr. Burnworth's direct examination by his own counsel was terminated by the referee (Tr. Vol. VI, 10/22/80, pp. 131, 180) after less than one hour's time (Tr. Vol. VI, 10/22/80, pp. 132, 136, 179-180). In spite of the referee's earlier ruling, Mr. Burnworth's allowed time to question witnesses was cut from twenty to ten minutes apiece (Tr. Vol. VI, 10/22/80, pp. 133, 136). Again the Court asserted its five o'clock deadline (Tr. Vol. VI, 10/22/80, p. 135).

Mr. Burnworth's counsel presented documentary evidence without testimony to explain it (Tr. Vol. VI, 10/22/80, p. 183) due to lack of time. The Court would not allow rebuttal witnesses (Tr. Vol. VI, 10/22/80, pp. 235-236). The referee did not allow counsel to complete closing arguments (Tr. Vol. VI, 10/22/80, pp. 249-250). Therefore, Mrs. Burnworth was allowed five and one-half separate settings in which to present evidence while Mr. Burnworth was allowed approximately one-half day.

Property to be considered by the referee included real estate owned by Mrs. Burnworth in Indiana and Arvada, Colorado; Mr. Burnworth's patent on an invention, Mrs. Burnworth's "psychic business" and Mr. Burnworth's contribution thereto; the "family home" owned by Mr. Burnworth prior to the parties' marriage, real estate at Columbine Lake, Colorado, purchased during the marriage, household furnishings, possession of which reposed in Mrs. Burnworth at the time of hearings; Mr. Burnworth's "Cosmonique" medications, insurance proceeds from burglary claims, cars, and Mr. Burnworth's pension plan.

The referee and district court ruled the Indiana real estate a gift to Mrs. Burnworth from her father in which Mr. Burnworth had no interest; Mrs. Burnworth didn't own a townhouse in Arvada; neither party received an interest in the other's businesses or inventions; the family home's value increased \$33,926.00 during the marriage entitling Mrs. Burnworth to one-half that amount; substantially all the household furniture, most of which was owned by Mr. Burnworth prior to the marriage was awarded to Mrs. Burnworth; Columbine Lake property was marital and Mrs. Burnworth was entitled to one-half its value; Mrs. Burnworth received two Cadillacs while Mr. Burnworth received a 1976 Plymouth; the 1965 Mercedes gifted to Mr. Burnworth during the marriage be sold and proceeds divided, and Mr. Burnworth's pension plan be set over to him. *See Referee's Findings, Recommendation and Order, Appendix F.*

C. Jurisdiction of This Court

Mr. Burnworth raised the issue of lack of due process in the first instance when his trial counsel objected to the referee the morning of October 22, 1980, as to the

severe and stringent time limitations placed upon his client's testimony (Tr. Vol. VI, 10/22/80, pp. 5-7, pp. 40-41). The same objections were made throughout the hearing and as the proceedings concluded (Tr. Vol. VI, 10/22/80, pp. 245-247) and in his motions challenging the referee's "findings, recommendation and order" which motions were filed with the Adams County District Court November 14, 1980, eight days after the date of the referee's order and the district court order approving it (Vol. I, pp. 55-61, 70). As transcripts of the referee's hearings were not available until January 16, 1981, Mr. Burnworth filed his motion to vacate the referee's order February 19, 1981 (Vol. I, pp. 81-83), which motion included his due process argument. In affirming the referee's order, the district court overruled Mr. Burnworth's due process argument of severe and stringent time limitations on his right to present a full and complete case under the reasoning that "the primary reason for the inordinate time expended on this matter was trial counsel's contentiousness and the Referee's unwillingness to limit counsel in their endeavors." (Appendix E, p. A7; Vol. I, pp. 89-90).

Mr. Burnworth then timely filed a motion for new trial with the Adams County District Court (Vol. I, p. 108) in which he again argued he was not given sufficient time in which to present his case due to time restraints imposed by the referee. His motion incorporated the affidavit of trial counsel specifically setting forth the referee's limiting actions. The district court summarily overruled this motion (Appendix D, p. A6; Vol. I, p. 117).

After filing his notice of appeal to the Colorado Court of Appeals, Mr. Burnworth filed his brief with that court in which he presented and argued the issue whether his due process of law rights were violated:

[W]here the hearing was held on six different dates over a six-month period; and where the Referee, having earlier lost control over the litigants, their counsel, and the proceedings, imposed on the last hearing day arbitrary time limitations for the taking of testimony which precluded the respondent from fully presenting his case.

(Brief of Respondent-Appellant in the Colorado Court of Appeals, pp. 1, 3, 6-17). The Colorado Court of Appeals ruled Mr. Burnworth's due process argument was without merit, as the responsibility to organize a case for presentation to the court belonged to counsel, and when the failure to so do results in error, error is invited and does not warrant reversal (Appendix C, p. A5).

In his Petition for Writ of Certiorari to the Supreme Court of Colorado Mr. Burnworth again raised the due process argument thus:

Were Mr. Burnworth's rights to due process of law violated when he was denied the opportunity to present his evidence before a Judge, was forced to present his case on six different dates over a six-month period ~~and was subjected~~ to arbitrary time limitations imposed by a Referee which precluded him from fully presenting his case?

(Respondent's Petition for Certiorari to the Colorado Supreme Court, pp. 2, 5). Mr. Burnworth's Petition for Writ of Certiorari was denied (Appendix A, p. A1).

REASONS FOR GRANTING THE WRIT

Mr. Burnworth Was Denied Due Process of Law, Under the United States Constitution Amendment Fourteen Section 1, the Due Process Clause, Because He Was Denied a Meaningful Opportunity to Be Heard on the Merits of His Case.

Hearings in Mr. Burnworth's divorce commenced April 30, 1980. The last hearing was not held until October 22, 1980. Mr. Burnworth was the respondent in those proceedings, perforce, granted the last, rather than the first, chance to present evidence. Although Mr. Burnworth was allowed to present two minor witnesses out of time the first day of hearings before his wife commenced testimony, he never received a chance to completely present his case. The other hearing dates, April 30, 1980, June 18, 1980, July 16, 1980, October 2, 1980, and October 21, 1980, were consumed almost entirely with his wife's case through testimony and evidence. It was only on October 22, 1980, which turned out to be the last day of hearings, that Mr. Burnworth was allowed to present his testimony. He had no knowledge before that date it would be his last chance to be heard. Further, when he finally was allowed to present evidence, other than the two witnesses he was allowed to call out of time, the referee severely limited the time during which he was allowed to testify, resulting in (a) his counsel's admission of documentary evidence without a corresponding opportunity to explain it, and (b) an incomplete picture of the facts being presented to the referee, which picture lacked evidence regarding real estate acquisitions, and evidence regarding gifts and contributions to his wife's business, among other things.

As well, Mr. Burnworth's time allotted for cross-examination of his wife after days of testimony by her was limited to less than one hour. The result, as indicated to the best of his trial counsel's ability in the ten minutes counsel was allotted for closing arguments, is Mr. Burnworth was forced to make an offer of proof of what his evidence would have been had he been allowed to complete his case. The family home's value was improperly computed by the referee, Mr. Burnworth received no credit for cash contributions to his wife's business, he was locked out of property gifted to his wife while being forced to divide property with which he was gifted, and his wife was awarded a house full of furniture, most of which was Mr. Burnworth's prior to the marriage. Had Mr. Burnworth had the chance to present evidence, these problems might have been avoided. Clearly Mr. Burnworth has been deprived of property interests by the decision of the referee.

In *Bodie v. Connecticut*, 401 U.S. 371 (1971) this Court recognized marriages are one of the few relationships in which the state maintains an interest from beginning to end. One cannot be married without state sanction, nor can one dissolve the relationship without state action. The divorce process must be, and was in this case, an act of the State of Colorado. As such, the Fourteenth Amendment Due Process Clause is applicable to this state action. *Id.* at 377-378.

A litigant is entitled to a meaningful opportunity to be heard on the merits of his case. *Id.* at 378. Mr. Burnworth availed himself of this opportunity to the best of his ability. Trial counsel strenuously objected on October 22, 1980, to the time constraints placed upon him by the referee and used all available means at every

stage of the proceeding to remedy the referee's wrong to no avail.

Bodie taught us:

[T]hat due process requires, at a minimum, that absent a countervailing state interest of overriding significance persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Id. at 378. The Court's decision in *Bodie* echoed the Fourteenth Amendment holding of *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950):

There can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be precedent by notice and opportunity for hearing appropriate to the nature of the case.

Id. at 313. The Constitution requires an opportunity to be heard "in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *Bodie* held:

A State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment pre-empt the right to dissolve this legal relationship [marriage] without affording all citizens access to the means it has provided for so doing.

Id. at 384. In Mr. Burnworth's case, the referee and the state through its district and appellate courts failed to follow this mandate.

Further, when the state law regulating divorce conflicts with the Fourteenth Amendment, "It is the duty of the federal courts to resolve that conflict in favor of the Constitution." *Geisinger v. Voss*, 352 F.Supp. 104, 109 (D.C. E.D. Wisc. 1972).

In *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) this Court, in determining an applicant's rights to hearing before denial of admission to the New York bar, echoing *Morgan v. United States*, 304 U.S. 1, 18-19 (1938), held:

A 'full hearing' - a fair and open hearing - requires more than that Those who are brought into contest with . . . Government . . . are entitled . . . to be heard upon its proposals before it issues its final command.

Willner, 373 U.S. at 105. Full hearing is the key command of this Court. One in jeopardy of serious loss should be given the opportunity to meet the case against him. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172 (1951).

Although not binding on this Court, *Halldorson v. Halldorson*, 175 Mont. 170, 573 P.2d 169 (1977) is persuasive. In a Montana dissolution of marriage proceeding, in which the trial judge discontinued trial after wife testified and before husband had an opportunity to present his case, the Montana Supreme Court reversed the trial judge's rulings regarding division of property and the like noting, although husband raised no objection to the discontinuance at the trial court level, it was "plain error" for the trial judge to so act. Husband was so blatantly deprived of a fair and impartial trial contrary to the United States Constitution Fourteenth Amendment Due Process Clause the Montana Supreme Court could not help but restore to the husband his meaningful opportunity to be heard. It is this relief Mr. Burnworth seeks in petitioning this Court for a writ of certiorari.

CONCLUSION

For the reasons herein stated, a writ of certiorari should issue to review the order of the Supreme Court of Colorado.

Respectfully submitted,

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APPENDIX A

(Filed January 10, 1984)

SUPREME COURT OF COLORADO

Case No. 83SC230

**CERTIORARI TO THE COLORADO COURT OF
APPEALS 81CA0656**

In re the Marriage of:

DONALD O. BURNWORTH,
Petitioner,

vs.

EULA DEL BURNWORTH,
Respondent.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of the Court of Appeals,

It Is This Day Ordered that said Petition for Writ of Certiorari shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, January 9, 1984.

JUSTICE KIRSHBAUM DOES NOT PARTICIPATE.

Irvin Kent

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A2

cc: Mac V. Danford, Clerk
Colorado Court of Appeals

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APPENDIX B

(Filed June 9, 1983)

**IN THE
COURT OF APPEALS OF THE STATE OF COLORADO**

Case Number 81CA0656

In re the Marriage of

EULA DEL BURNWORTH,
Appellee,

vs.

DONALD OTIS BURNWORTH,
Appellant.

ORDER

Upon consideration of the Petition for Rehearing filed by the APPELLANT herein, said Petition is hereby DENIED. Unless otherwise ordered, mandate will issue June 16, 1983.

BY THE COURT, KELLY, VAN CISE AND KIRSH-BUAM, JJ.

DATED: June 9, 1983

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such stay must be filed in the Court of Appeals prior to the above date of issue.

APPENDIX C

(Filed April 21, 1983)

COLORADO COURT OF APPEALS

No. 81CA0656

In re the Marriage of:

EULA DEL BURNWORTH,

Appellee,

and

DONALD OTIS BURNWORTH,

Appellant.

Appeal from the District Court of Adams County
Honorable Philip F. Roan, Judge

JUDGMENT AFFIRMED

DIVISION III

Opinion by JUDGE KELLY

Van Cise and Kirshbaum, JJ., concur

Epstein, Epstein and Lozow, P.C.

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Denver, Colorado

Irvin M. Kent

Denver, Colorado

Attorneys for Appellee

Peter H. Ney, P.C.

Peter H. Ney

Littleton, Colorado

Attorneys for Appellant

In this dissolution of marriage action, husband appeals the permanent orders dividing the property of the parties, which orders were based upon the findings and recommendations of the referee. Husband contends that the local rule authorizing proceedings before a referee is

invalid, that he was deprived of due process of law in those proceedings, and that the referee's findings, recommendation, and order adopted by the trial court were not supported by the evidence. We affirm.

We do not address the husband's first argument that Local Rule 38 is invalid. This issue was not presented to the trial court, and was not included in husband's motion for new trial. Accordingly, review is precluded. *Rowe v. Watered Down Farms*, 195 Colo. 152, 576 P.2d 172 (1978); *Kopff v. Judd*, 134 Colo. 330, 304 P.2d 623 (1956); C.R.C.P. 59(f).

Husband's argument that he was deprived of due process by the failure of the referee to organize and control the proceedings is without merit. It is the responsibility of counsel to organize the case for presentation to the court. If the failure to do so results in error, the error is invited and does not warrant reversal. *Newland v. Holland*, 624 P.2d 933 (Colo. App. 1981). The record here supports the trial court's conclusion that delay in the proceedings was invited by counsel's presentation of the case and that the parties were given ample opportunity to present their evidence.

The argument that the referee's findings, recommendation, and order, which were adopted by the trial court, were not supported by the evidence is also without merit. The referee's evaluation and division of the property about which husband complains were based either on husband's own documentation of value, on stipulation of the parties concerning value, on conflicting evidence, or on evidence that there was a gift from husband to wife. Under these circumstances, we are bound by the rule that an appellate court will not reverse where the trial court findings are supported by the evidence. *Gebhardt v. Gebhardt*, 198 Colo. 28, 595 P.2d 1048 (1979).

Judgment affirmed.

JUDGE VAN CISE and JUDGE KIRSHBAUM concur.

APPENDIX D

(Filed May 28, 1981)

IN THE DISTRICT COURT
COUNTY OF ADAMS
STATE OF COLORADO

Civil Action No. 79DR1402

IN RE THE MARRIAGE OF:

EULA DEL BURNWORTH, a/k/a
LOU WRIGHT, Petitioner
and

DONALD O. BURNWORTH, Respondent

ORDER

THIS MATTER coming before the Court upon the RESPONDENT'S MOTION FOR NEW TRIAL C.R.C.P. 59, the Court having reviewed the MOTION FOR NEW TRIAL and having reviewed the Affidavit submitted by counsel for the Respondent and having read the MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL, and being fully advised in the premises,

DOTH ORDER, ADJUDGE AND DECREE as follows:

1. That the Court has jurisdiction over the parties and subject matter.

2. That the Motion for New Trial C.R.C.P. 59 be and the same is hereby denied.

Done and signed in Open Court this 28th day of May, 1981.

BY THE COURT:

/s/ Philip F. Roan
Philip F. Roan
Chief Judge

copies sent to counsel

5/28/81

APPENDIX E

**IN THE DISTRICT COURT
COUNTY OF ADAMS
STATE OF COLORADO**

Civil Action No. 79DR1402

IN RE THE MARRIAGE OF:

**EULA DEL BURNWORTH, a/k/a
LOU WRIGHT, Petitioner
and**

DONALD O. BURNWORTH, Respondent

ORDER

THIS MATTER coming on for review pursuant to Local Rule 38, upon the motion of Respondent, and the parties being present in person and by their respective counsel of record and the Court having heard argument and having reviewed the case file, having examined the entire transcript and having reviewed all of the admitted exhibits and being fully advised in the premises,

FINDS, CONCLUDES AND ORDERS as follows:

1. This matter comes before the Court for review pursuant to Local Rule 38 on motion by the Respondent.

2. Respondent seeks review of the Referee's Findings, Recommendation and Order, adopted by this Court and entered as an Order and alleges that the Referee erred in the following respects:

a. The Referee denied Respondent due process of law by placing severe and stringent time limitations on the Respondent's right to present a full and complete case.

- b. The Referee erred in fact interpretation.
- c. The Referee erred in applying law to the facts.

3. This Court finds that the Referee heard this matter on four separate days, being April 30, 1980, July 16, 1980 and October 21 and October 22, 1980.

4. The transcript is replete with examples of the Referee's regard for due process for both parties despite allegations to the contrary. This was not a complex case and it is clear the primary reason for the inordinate time expended on this matter was trial counsel's contentiousness and the Referee's unwillingness to limit counsel in their endeavors.

5. This marriage of short duration left emotional carnage out of all proportion strewn on the property battlefield.

6. The Referee's order appears to the Court to properly decide all of the relevant issues in accord with the mandates of statute and case law as the Court understands them and, pursuant to C.R.C.P. Rule 52 (a), the Court adopts the Referee's findings.

7. During oral arguments on March 30, 1981 the Respondent presented a Motion For Stay pursuant to Rule 62 of the C.R.C.P. and the Court denied this motion. The Court, upon reconsideration, grants Respondent's Motion To Stay Enforcement of Judgment.

8. The Court affirms the Referee's Findings, Recommendations and Order previously entered as an Order of Court on November 6, 1980 and finds that Respondent's assignments of error directed to that Order are without merit.

9. The Court grants counsel thirty (30) days to file motions.

A9

Done and signed in Open Court this 10th day of
April, 1981.

BY THE COURT:

/s/ Philip F. Roan
Philip F. Roan
Chief Judge

copies sent to counsel

4/10/81

copy sent to David Brezina, Clerk of the Supreme Court.

APPENDIX F

(Filed November 6, 1980)

IN THE DISTRICT COURT IN AND FOR
THE COUNTY OF ADAMS
STATE OF COLORADO

Civil Action No. 79DR1402

In re the Marriage of:

EULA DEL BURNWORTH,
a/k/a LOU WRIGHT,
Petitioner,
and
DONALD O. BURNWORTH,
Respondent.

**REFEREE'S FINDINGS, RECOMMENDATION,
AND ORDER**

PROPERTY IN INDIANA:

This property was a gift or inheritance from petitioner's father in which the respondent has no interest. Therefore, all property located in Indiana held in the name of the petitioner is awarded to the petitioner alone as per C.R.S. 14-10-113(2) (a).

TOWNHOUSE IN ARVADA:

The Court finds that there is no real evidence supporting the claim of respondent that the petitioner has any legal or equitable interest in the townhouse located in Arvada wherein petitioner resides. Therefore, no award is made concerning this piece of property.

PATENT AND LOU WRIGHT PSYCHIC BUSINESS:

Petitioner desires a share in the respondent's patent involving aircraft. Respondent desires a share in the petitioner's psychic business.

1. No firm value has been placed upon either the patent or the psychic business either at the time of marriage or at the time of this dissolution.

2. All ideas concerning the patent grew out of the mind of the respondent alone. All ideas concerning the petitioner's psychic business are those of the petitioner alone.

3. Petitioner claims to have assisted the respondent in obtaining his patent. The uncontradicted evidence shows that respondent hired one Martin Miller, Esq., who was given a 10 percent interest in respondent's patent for his labors in assisting him in obtaining the patent in question; and further, respondent hired Mr. John R. Ley, patent attorney, to obtain the patent; and that one Grace Sutliff, witness who appeared at two separate hearings, claims a 20 percent interest in the patent for her efforts in obtaining proper contacts and assisting in obtaining the patent, etc.

The evidence of both petitioner and respondent is questionable as to their respective assistance to one another in helping the other party obtain and enlarge her business or his patent.

4. The parties were married on December the 21st, 1976. Petitioner filed petitioner Dissolution of Marriage July 9, 1979; and therefore, they lived together but two and one-half years and have been trying to dissolve the marriage for over a year.

Therefore, the Court finds that neither party contributed to the other's ideas in any substantial way so as to warrant either party in being awarded an interest in the other's invention or business, as the case may be.

Therefore, petitioner's claim to an interest in the respondent's patent is denied and respondent's claim for an interest in the petitioner's psychic business is denied as per C.R.S. 14-10-113(1)(a), (b), (c), and (d).

FAMILY HOME - 6650 Quitman, Arvada:

This home was purchased by the respondent prior to the marriage of December 21, 1976.

1. The Alkine appraisal placed the present value of the property, considering needed repairs, as \$140,895.

The Winsett appraisal placed the present value of the property, considering \$10,000 needed repairs, as \$130,000.

The average of the two appraisals equals \$135,447 which the Court now uses as the more acceptable figure available, absence a sale, considering the differing opinions of the appraisers.

In the evidence there is only one acceptable figure of the estimated value of the Quitman property at or near the time of the marriage, and that is the figure of \$110,000 as of November 21, 1977. The parties so stipulated that the property was worth at least this \$110,000 as of November 21, 1977.

From that date to today's date, the property increased to \$135,447 or a total of \$25,447, or \$8,482 per year (three years). Therefore, the property at the date of marriage was at least the \$110,000 (agreed value as of November 21, 1977) minus \$8,482 (the average) increase from November 21, 1977, to the date of dissolution—to give a value at date of marriage of \$101,518.

As per C.R.S. 14-10-113(1)(d), the petitioner is entitled to her fair share of any increase in value of property held during the marriage.

Therefore, the Court feels that the property in question increased \$33,929—i.e., \$135,447 minus \$101,518—to which the petitioner is entitled to half or \$16,964.

Therefore, the respondent is awarded the home known as 6650 Quitman with the petitioner to quit claim any interest she has to said respondent in said property within 30 days of date or the Clerk of the District Court is authorized to do so; the respondent to be responsible to pay any mortgages or debts on said property and to hold petitioner harmless on said indebtedness.

The respondent is to give to the petitioner a note and Deed of Trust on said property in the sum of \$16,964 payable, together with interest, at the rate of 10 percent per annum on or before April 22, 1981.

MISCELLANEOUS PERSONAL PROPERTY: *Furniture, Furs, Coin Collection, Etc.:*

There is conflicting testimony as to the personal property of the parties. Petitioner indicates the parties have divided the property by agreement. The respondent denies this and alleges that petitioner has much of the furniture and other personal property. As it is impossible for the Court to know the truth of the matter, each party is awarded the personal property presently in their respective possessions.

COLUMBINE LAKE REALTY:

The parties have stipulated to the value of the Columbine Lake property as follows:

Lot 47, Block II	\$12,500
Lot 48, Block II	\$11,500

This property is marital property and, therefore, each is entitled to 50 percent of its value. The respondent is awarded the Columbine Lake realty. He is to give the petitioner a note and Deed of Trust on said property in the sum of \$11,500 less 50 percent of the outstanding debt due on said property as of October 22, 1980, said note to bear interest at the rate of 10 percent per annum and payable on or before January 22, 1980. Petitioner is to quit claim her interest in said property within 30 days or the Clerk of the District Court is authorized to do so. Respondent henceforth is to be responsible and hold petitioner harmless of any indebtedness due on this property.

COSMONIQUE:

It is alleged that respondent was instrumental in bringing this medication to the United States and that there is a value in said medication which petitioner should share in.

There is no evidence of any contribution by the petitioner in bringing this item to the United States, no evidence as to any real value in said item; and further, the marriage is of such short duration, the petitioner should not be entitled to the division of any property so speculative in value. Therefore, petitioner's claim in the respondent's interest in Cosmonique is denied. The respondent is awarded any and all present interest he has in this product.

LOANS BY RELATIVES:

Any and all claims that are allegedly owed to any relatives of either party are to be pursued by that claimant in a civil court. This court will not attempt to deter-

mine the legality of said type of claim as it could be a gift, a bona fide loan, etc. In the instant case, the Court finds no real evidence that respondent owes Olive Conner, mother of petitioner, the sum of \$5,000.

STIPULATION AS TO INSURANCE PROCEEDS:

As previously declared, the stipulation of the parties concerning insurance proceeds, because of burglaries, is approved by the court. And, therefore, this court leaves the distribution of any proceeds strictly to the discretion of the insurance carrier.

CARS:

The petitioner is awarded the 1976 and the 1974 Cadillacs. The respondent is awarded the 1976 Plymouth. Each is to be responsible for any indebtedness on their respective auto or autos and to hold the other party harmless on said debts. Each is to convey to the other within 30 days any interest they have in the other's auto or autos or the Clerk of the District Court is authorized to do so.

The 1965 Mercedes is to be sold and the net proceeds to be divided between the parties.

LIS PENDENS:

The Lis Pendens previously issued is to be set aside upon the respondent giving to the petitioner the Deed of Trust on said property as previously ordered.

MAINTENANCE:

In view of the fact that both parties have sufficient income through employment and otherwise to support themselves and that through this Order in the division

of property both parties have sufficient property to provide for their reasonable needs, the claim to maintenance for both parties is denied—C.R.S. 14-10-114(1).

PENSION PLANS:

Respondent is awarded any and all interest in his pension plan. Because of the contradictions as to the vested or nonvested interest of respondent in his pension plan and because the marriage was of such short duration, the Court feels she is not entitled to any part of this plan.

ATTORNEY'S FEES:

Each is to pay their own attorney's fees. Both parties are employed, making good incomes, and both have substantial property. Therefore, both litigants can afford to pay their own attorney's fees.

DEBTS:

Each is to pay their own debts as listed on their respective Financial Affidavits unless otherwise inconsistent with the above orders, which above orders take precedence over this portion of the total Order.

MEDICAL ASSISTANCE:

Denied to petitioner as the medical testimony of the petitioner's witness, Dr. DeLorenzo, indicated the ailments of petitioner were probably premarital; and, in any event, there was no evidence before the Court that convinced the Court that petitioner could not continue to function in her occupation as she has in the past.

A17

Done this 6th day of November, 1980, nunc pro tunc
October 22, 1980.

BY THE COURT:

/s/ (Illegible)

Referee

/s/ Philip F. Roan

Judge

cc: Theodore Epstein, Esq.

820 16th Street

Denver, Colorado 80202

Robert E. Long, Esq.

1901 West Littleton Boulevard

Littleton, Colorado 80120

No. 83-1603

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVENS
CLERK

In the Supreme Court of the United States

October Term, 1983

DONALD OTIS BURNWORTH.

Petitioner,

vs.

EULA DEL BURNWORTH.

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE
OF COLORADO**

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Attorneys for Respondent

QUESTION PRESENTED

Whether this Court should grant a writ of certiorari to review an alleged denial of due process, where the Petitioner at trial had full and ample opportunity to present his case to the trial court?

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DONALD OTIS BURNWORTH,

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OPINIONS BELOW

The opinions below are correctly set forth in the Appendices to the Petition.

JURISDICTION

The jurisdiction of this Court rests upon the basis stated by Petitioner, to wit: 28 USC 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment Fourteen is correctly quoted by Petitioner.

STATEMENT OF THE CASE

A. Procedure

The procedural history of the case is correctly set forth by Petitioner on pages 3-4, of the Petition.

B. Facts

This dissolution proceeding was heard by a Referee pursuant to a Local Rule without objection by Petitioner.

During the course of the hearing before the Referee, for the convenience of the parties and the witnesses, many witnesses were called out of order. Thus a great deal of the Petitioner's (hereafter Donald) witnesses were heard by the Referee during the course of the Respondent's (hereafter Eula Del) case in chief. Hearings were held before the Referee on April 30, 1980 (TR. Vol. 1) which show that four witnesses were called by Donald, including one as to the value of certain real estate, and two witnesses were heard for Eula Del; on July 15, 1980 (TR. Vol. 3), during which three witnesses were called by Donald and five by Eula Del; on October 21, 1980 (TR. Vol. 5) during which Donald was called as an adverse witness by Eula Del, and Eula Del testified on her own behalf. Donald's counsel had an opportunity, which he chose not to use, to examine Donald at this hearing before Eula Del was called (TR. Vol. 5, p. 72); and on October 22, 1980 (TR. Vol. 6). On this last day, Eula Del completed her testimony and called five other witnesses; and Donald testified, called Eula Del as an adverse witness and also called three other witnesses.

TR. Vol. 2 was a short hearing, during which no witnesses were heard, which dealt with Temporary Orders. TR. Vol. 4 also involved a brief hearing, which was held before Judge Roan on Donald's request to lift a lis pendens which had been placed on the property at 6650 Quitman Court in

Arvada (hereinafter the Quitman property). None of the material contained in TR. Volumes 2 and 4 has any relevancy to this Petition.

On November 6, 1980 the Referee submitted his recommended order which was approved and made an Order of the District Court on that day. Thereafter, pursuant to Local Rule 38, Donald moved on February 17, 1981 to vacate and set aside the Order of November 6, 1980 (Vol. 1 p. 81).

On March 30, 1981, Judge Roan of the District Court heard oral argument on this Motion. This was recorded and made part of the Record in a Volume which bears that date, but is unnumbered. At this hearing, Donald raised the question of the value of the Quitman property at the time of the marriage, stating that the Referee, in setting the value at \$110,000.00 had set too low a figure thereon (p. 5) and, therefore, the increase in value during the marriage of this property was set too high (p. 8). There was also an objection made to the valuation of certain mountain property referred to as the Columbine Lake property (p. 10), and also to the inclusion of the same in the marital estate (p. 11). A similar objection was entered as to the inclusion of a Mercedes automobile in the marital estate (p. 12-13). Donald further objected to the division of the personalty (p. 13-14). With regard to procedure, Donald objected to the speed ordered by the Referee as to the proceedings on the last day of the evidentiary hearings (p. 14-15) and to the fact that he claimed the Referee was confused (p. 15). Nowhere at that time did Donald object to the application of Local Rule 38, *per se*.

On April 10, 1981, Judge Roan denied the Rule 38 request and again affirmed the recommended findings and order of the Referee, and gave the parties thirty (30) days in which to file Motions (Vol. 1, p. 89-90).

Since the issue raised by Donald depends upon the facts of record, those facts (and record references thereto) which support the decision below will be incorporated in the pertinent sections of the reasons for denying the writ.

REASONS FOR DENYING THE WRIT

Donald was given a full and fair opportunity to present his evidence. Such limitations as were placed upon time for argument and cross examination were within the sound discretion of the trial court and that discretion was not abused. This case does not present a denial of due process of law.

Donald complains here that he was allowed to call only two witnesses out of time and this was severely circumscribed in presenting his case. The facts, as contained in the record show that during Eula Del's case he actually called four witnesses during the first day of hearings, three at another hearing, and three more on the final day of evidentiary hearings. Further, when he was called as an adverse witness, on the third day of evidentiary hearings, his counsel had an opportunity, which he did not use, to cross examine his own client without any apparent time limitation.

It requires no citation of authority for the proposition that one cannot seek reversal based upon self induced error. The gist of Donald's arguments is that the court did not give him enough time and thus precluded him from getting certain alleged facts into evidence.

A fair reading of the record shows that Donald's time problems were self induced because of constant repetition. This was repeatedly pointed out by the Referee (see e.g. Vol. 6, pp. 44, 45, 48, 49, 72, 73 and 77). Indeed, despite his proper orders on the time for examination and cross examination for witnesses (Vol. 6, p. 39-41), the Referee frequently allowed counsel for Donald more time than those orders provided (see e.g. Vol. 6, p. 73, 74.)

Time which would otherwise have been available to Donald was also wasted by going into matters which had been covered by stipulation on the insurance proceeds for stolen items (e.g. Vol. 6, pp. 16-25), and on the value of the Columbine real property (Vol. 6, p. 198, 199) which had also been covered by stipulation (Vol. 5, p. 36, 37).

During the course of proceedings in the courts of Colorado, Donald's counsel at the trial level submitted an affidavit, which set forth the matters as to which Donald was not given the opportunity to testify. The record shows, however, that as to most of these at least, Donald did testify; for example, Donald did get in his version of the following items which it is now claimed he did not have time to cover;

a) As to property allegedly taken by Eula Del (Vol. 5, p. 25, 27-20).

b) As to his trade of previously owned non marital property for the mountain lots (Vol. 5, p. 36, 37 and 39).

c) As to the alleged gift to him alone of the Mercedes automobile by his father (Vol. 5, p. 40).

d) As to Eula Del's alleged expenditures of certain sums (Vol. 5, p. 42).

e) As to Eula Del's alleged damage to the marital home (Vol. 5, p. 44).

f) As to Eula Del's alleged failure to contribute towards expenses (Vol. 5, p. 45).

g) As to who made the payments on the Columbine lots (Vol. 5, p. 47 and 48).

Small wonder then that the Referee refused to allow more time to go over these same matters again.

The Court has proper control over such matters and they must be tested on an abuse of discretion doctrine. The rule is clear that:

"The right to introduce testimony on any cause is not without restriction as to nature and time. Testimony may, and should, properly be restricted to matters which are relevant and material, and not cumulative nor repetitions. . . ."

"Where the court orders testimony closed, it is the duty of counsel by offer of proof to point out to the court specifically the testimony desired to be introduced."

Johnston v. Johnstone, 123 Colo. 28, 32, 224 P.2d 949 (1950); see also: *Bond v. Local Union* 823, 521 F.2d 5, 11 (8th Cir. 1975).

Based upon this standard, it is clear that the Referee acted properly and that counsel for Donald simply did not. The offers of proof, or lack of them, in the record simply do support his present claims as to precluded testimony.

Donald complains here that he did not have an opportunity to present his side of the case and that there were many items he was not able to cover in his testimony. In so doing, he ignores the fact that almost all of the possibly relevant items as to which he has, or might, complain were already covered by him when he was called as a witness by Eula Del. His counsel, at that time, prior to the announcement by the Referee of any time restrictions, had the right to further examine him thereon but chose not to do so. This is but another example of the self inflicted wounds upon which he has predicated his petition.

The record shows that he did get his version in as to the critical items.

With regard to any limitations on time for cross examination of witnesses, this is a matter within the sound discretion of the trial court, and error must be tested by abuse of discretion standard (*United States v. Blitzstein*, 626

F.2d 774, 783 (10th Cir. 1980); *Government of the Virgin Islands v. Blyden*, 626 F.2d 310, 313 (3rd Cir. 1980).

The same rule applies with regard to limitation upon the time allotted for argument (*Biggs v. Mays*, 125 F.2d 693 (8th Cir. 1942)).

The rules announced by this Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971) do not require review of this case in the light of the fact that Donald was not precluded from presenting his version of the facts and having his witnesses heard. He has had a full measure of due process within the meaning of *Boddie*.

CONCLUSION

The factual posture of this case, based upon the proceedings at the trial court level demonstrate that there was no denial of due process. Nothing in this Petition justifies the expenditure of the limited time of this Court for consideration of the merits. This Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three true copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari were mailed, first class postage prepaid, and addressed to:

HUFFMAN REED WALKER ESQ
Barnett & Ross, Chartered
705 North 8th St.
Kansas City, Kansas 66117

this 23rd day of April 1984.



Irvin M. Kent